SUPREME COURT U.S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. .....

October Term, 1975

No. 75-329

ROBERT R. KAUFMAN,
Petitioner,

v.

JAMES R. DUMPSON, Administrator of the Human Resources Administration of the City of New York,
Respondent.

Petition for A Writ of Certiorari to the Appellate Division Second Department, of the Supreme Court of the State of New York and the Court of Appeals of the State of New York.

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5. The hearing was illegal and deprived petitioner of due process since the person who brought the charges and tried petitioner and judged and sentenced him was the same as the one complaing.
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Petition for A Writ of Certiorari to the Appellate Division Second Department, of the Supreme Court of the State of New York and the Court of Appeals of the State of New York.

Petitioner prays that a writ of certiorari issue to review the orders of the Appellate Division of the Supreme Court Second Department entered September 19, 1974, and the Court of Appeals of the State of New York entered January 20, 1975.

OPINION BELOW

The Courts below wrote no opinions.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3), and under 28 U.S.C. 1254

The Ruling Below and the Reasons for Granting Certiorari

The Appellate Division below dismissed the petition and affirmed the determination of the Respondent. The Court of Appeals dismissed petitioner's appeal as of right upon the ground that no substantial constitutional question is directly involved.

STATEMENT OF CASE

This was an Article 78 proceeding for a judgment reviewing and annulling a determination of the respondent, dismissing petitioner from his position as Caseworker II Administrative Assistant to the Senior Case Supervisor, in the Department of Human Resources Administration. The original petition of March 18, 1974 was brought in the Supreme Court Kings County, to annul the determination dated March 6, 1974. The matter was referred to the Appellate Division Second Department on May 1, 1974. The Appellate Division dismissed the petition September 19, 1974. Petitioner applied to the Appellate Division for leave to appeal to the Court of Appeals, which application was denied November 6, 1974. Petitioner, on November 8, 1974, duly served and filed a notice of appeal to the Court of Appeals as of right reciting that substantial constitutional questions were directly involved. The Court of Appeals granted respondent's motion to dismiss the appeal upon the ground that no substantial constitutional question was directly involved, by order entered January 20, 1975.

Petitioner applied to the Court of Appeals on February 10, 1975 for leave to appeal to the Court of Appeals. This was

denied on March 19, 1975. On May 5, 1975 petitioner applied to the Court of Appeals for reargument and reconsideration of the motion made February 10, 1975 and the order of dismissal of the appeal taken as of right, entered January 20, 1975. This motion was denied June 4, 1975. On July 25, 1975 Petitioner moved in the Appellate Division of the Supreme Court, Second Department for reargument and reconsideration, on the ground that in a case before them which was decided after this proceeding, the Court had recognized and ruled that similar violations of the rights of the defendant had occurred and they had ruled in his favor. This motion was denied.

Petitioner was employed by the City of New York since October 2, 1966. He was appointed and certified from a Civil Service list after a competitive examination. This was his eighth year with the department. On February 16, 1972 he was promoted to Narcotic Addiction Specialist and Addiction Coordinator. On October 2, 1973 petitioner was promoted to Administrative Assistant to the Senior Case Supervisor of the Wyckoff Center, who was in fact the Assistant Director of said center, in Brooklyn, New York.

The charges involved alleged insubordination. Petitioner was not advised of and did not receive a copy of the report or decision of the examiner until after the Article 78 proceeding had been scheduled before the New York Supreme Court, although he asked for the same on many occasions. The New York Civil Service Law, sections 75 and 76, provide for a copy to be supplied on demand.

The Court below held that no substantial constitutional question was directly involved despite the fact that Petitioner was deprived of his right to cross examination. Petitioner was prevented from cross examining on motive and required to confine himself to the testimony of the respondent's witness on direct (SMP 26, 29). In *Hecht v. Monoghan*, 307 N.Y. 471,

474, the Court of Appeals held:

> One of the fundamental aspects of constitutional due process in conduct of such a hearing is the right of cross examination.

The Court went on to say that the denial of the same was in fact a denial of due process. In the case at bar the charges were insubordination — *NO MORAL TUPRITUDE — NO ACT OF VIOLATION OF PROPERTY OR PERSON.* It was a one to one test. It was essential to examine the witness Schneider and the witness Epstein, the complainants, on their individual complaints as former supervisors. Their testimony was not tied in with the isolated complaints. It was essential to cross examine these witnesses and determine their possible motive and ulterior purposes in bringing the complaints and search out the truth. These ulterior motives were claimed by petitioner herein in his answer and the hearing examiner foreclosed the examination. Hence the denial of due process and an invasion of petitioner's constitutional guarantees as provided in the Fourteenth Amendment. Petitioner gave early notice that he claimed and alleged the invasion of his federal constitutional rights. These federal questions were raised by petitioner in his petition as well as his reply to the answer filed thereto, and his answer to respondent's charges.

Petitioner was found guilty of matters with which he was never charged and he never received notice that he was called upon to defend himself against. This constituted a direct violation of petitioner's constitutional rights as provided by the Fourteenth Amendment:

> AMENDMENT XIV
> Section 1. . . . nor shall any state deprive any person of life, liberty, or property without due process of law, . . .

The hearing examiner conceded she had consulted matter not in evidence and outside of the hearing.

This was in the nature of an alleged personnel file. Petitioner never saw this file nor was he given notice that this would be charged against him, nor what it consists of was kept completely from him. A violation of the Federal due process clause was claimed. No service was ever made on the petitioner of the papers contained therein. The respondent offered petitioner a thirty-day suspension but the hearing officer consulted other papers and matter not at the hearing and not in evidence. Petitioner's dismissal resulted.

The court below overlooked the many and prejudicial errors which occurred during the course of the hearing and the fact that the transgressions were of such quality and quantity as to severely prejudice and invade the constitutional safeguards afforded petitioner. The Appellate Division below so held on March 28, 1975 that such violations of a party's rights warranted reversal, *People v. Mackell*, N.Y.L.J. April 1, 1975. This court held *In Re Ruffalo*, 390 U.S. 544 that a defendant is entitled to procedural due process which includes fair notice of the charge.

The court observed further at 390 U.S. 551: "The charge must be known before the proceedings commence." The opinion concluded that "This absence of fair notice and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 552.

As the Court noted in *In Re Gault*, 387 U.S. 133:

> "Notice, to comply with due process requirements must be given sufficiently in advance of court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity."

Petitioner was denied a fair trial and an impartial trial and hence was denied due process. Petitioner sought to refer to his

answer to the charges which he duly served and filed with respondent. Petitioner sought to obtain the consideration of the hearing examiner to the motion he sought to make. He made an offer of proof when he was refused this opportunity. The hearing examiner stated, she had not read the answer, nor the affirmative defenses and she would not consider them, since she said:

> they are not available to her, nor to us at this hearing, and she would not permit any such submissions based thereon. (SMP 26, 27).

Hence, petitioner was denied a full and fair trial, an impartial trial, and he was denied due process.

Our courts have held:

> An overriding consideration is the insistence upon a fair trial and impartial trial. Where that has been denied a defendant it will not do to say that despite such denial, his guilt was clearly established.

The petitioner was presumed to be innocent until and unless proved guilty. The burden of proving incompetency or misconduct shall be upon the person alleging the same. By shifting this burden respondent has been guilty of invading the constitutional rights of petitioner and denying him due process.

The petitioner was being charged, tried, judged and prosecuted by the same person, namely, the respondent, and as such was denied constitutional due process. The hearing officer was a current employee of the respondent. The answer, petition and reply submitted by petitioner alleges the illegality and federal constitutional violations. Mr. Justice White of this Court held in the case of *Arnett v. Kennedy*, 416 U.S. 134:

> The employee in this case was denied due process by the fact that he was being judged by the very person that he

> was accused of attacking. Here the petitioner was being charged, tried, prosecuted and judged by the respondent.

It is respectfully submitted that this conflict precluded the possibility of a full and fair trial and hence there was a denial of due process.

The determination below and the sanctions imposed are shocking to one's sense of fairness. They are disproportionate to the offense charged and the punishment prescribed constitutes cruel and unusual punishment inflicted in violation of Article VIII of the United States Constitution.

> AMENDMENT VIII:
> Excessive bail shall not be required, nor excessive fines imposed . . ., nor cruel and unusual punishments inflicted.

Petitioner was offered a thirty-day suspension, and when he refused and asked for a Civil Service hearing under Sections 75 and 76 of the Civil Service Law, which is his guaranteed right, he was dismissed.

This Court has held that a refusal to construe basic presumptions, and basic rights of a defendant violates a fundamental and cardinal principle of due process. This Court has held that no inference of wrongdoing can be drawn, and that all persons are innocent until proved guilty. *Slochower v. Board of Higher Education of the City of New York*, 350 U.S 551; *Quinn v. United States*, 349 U.S. 155.

The hearing officer report states:

> I find that respondent failed to substantiate by a written authority, his conclusion that he was entitled to use his time to work on his grievance.

By so shifting the burden and not ruling on over 90% of petitioner's objections, the examiner has seriously violated the constitutional rights of respondent and deprived him of a full and fair trial and constitutional due process.

CONCLUSION

For all of the foregoing reasons, this petition for a writ should be granted.

Respectfully submitted,

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